

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

MOULTON MINING COMPANY, a Corporation,
CLARK-MONTANA REALTY COMPANY, a Corporation, ELM ORLU MINING COMPANY, a Corporation, and J. ROSS CLARK,

Appellants,

vs.

ANACONDA COPPER MINING COMPANY, a Corporation,

Appellee.

Appeal from the United States District Court for the District of Montana.

**ANSWER OF DEFENDANT-APPELLEE TO
APPELLANTS' PETITION FOR
REHEARING.**

FILED

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F. D. MONCKTON,
CLERK.

L. O. EVANS,
D. M. KELLY,
HENRY McALLISTER,
D. G. STIVERS,
Attorneys for Appellee.

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No. 5143.

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ANSWER OF DEFENDANT-APPELLEE TO
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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Counsel for Defendant upon Thursday, February 2d, were served with a galley proof copy of appellant's petition for a rehearing in the above case. The maps or diagrams referred to therein were

not furnished with the copy. Defendant had already prepared, and had in course of printing, a petition on the part of defendant for a limited rehearing or modification of the Court's opinion for filing within the time provided by the rule. It will be impossible, within this time, to consolidate the said petition with this answer, but, as part of this answer, we desire to refer the Court to the matters stated in defendant's petition for a limited rehearing and, in this answer, we will avoid, as far as possible, repetition of the matter therein set forth.

Plaintiffs move for a rehearing on three grounds. First, that under certain views of the Court, as found in the opinion, to the effect that in the westerly segments of the veins in controversy, west of the 370 foot plane, the Intermediate and View veins intermingle and unite in the upper workings, plaintiffs are entitled to be declared to be the owners of all of the veins and ore bodies in controversy to the east end line of the Poser claim under its ownership of the Intermediate and Rainbow lodes; second, that under the sub-fault apex contention of the plaintiffs in their brief, they are entitled to all of the vein or ore bodies in controversy; third, that the Pilot is a branch from the Emily vein, apexes in Poser surface and controls extralateral rights on the View vein below.

We will briefly discuss these points in this order.

INTERMEDIATE APEX RIGHTS.

Plaintiffs' petition for rehearing presents another startling change of position. Before the lower

court plaintiffs claimed the extralateral ore bodies and portions of veins now here in controversy as a part of the Intermediate vein, of east-west age, and a branch of the Rainbow. The defendant claimed such extralateral portions because of its surface ownership and also claimed them to be in a Vein which it called the View vein, of northwest age, which joined with the Emily vein, the apex of which, for a distance of 370 feet, is concededly within the defendant's premises. This issue, and no other, was presented on the trial, and that Court determined it by finding in favor of defendant's position, that the View vein was of northwest age and joined the Emily.

In this court plaintiffs accepted this finding of the Court, but contended that under it, and in accordance with the evidence of defendant's witnesses, plaintiffs would be entitled to the extralateral portions of the View vein lying westerly of the 370 foot plane of the Emily crossing. In this court, while plaintiffs also claimed that as a matter of law, in the westerly portion of the ground in controversy, the Intermediate and View veins were shown to be one, this is not the position they now take, as they now would have set aside the findings of the lower court upon the View and Emily veins.

Now we find plaintiffs again, in the face of the issue presented to the lower court and the acceptance of that Court's findings, seeking to re-open the original issue, and contending before this court that the Intermediate and its parent vein,

the Rainbow, control extralateral rights to the east end line plane of the Poser claim. This Court, evidently impressed by the showing upon the segments of the View vein that may lie westerly of the 370 foot plane, concluded that the decree should be modified to that extent, and in its discussion referred to the commingling of the View and Intermediate veins in certain of the drifts and workings in the higher levels. This Court has also accepted the lower Court's findings as to the junction of the View vein with the Emily vein and, in commenting on the conditions westerly of that point, without doubt had reference only to the ownership of the western segment of the View vein, but it is the language used in this connection that is seized upon by plaintiffs as a reason why the findings of the lower court should be disregarded and plaintiffs awarded their original claim.

If anything can be determined by judicial finding it certainly must be conceded that it has been irrevocably and finally settled that the Intermediate and View veins depart from each other going easterly in the 1550 drift, just west of the 1583 crosscut, the Intermediate proceeding northeasterly; the View vein proceeding to the southeast in 1550 drift, and the northerly branch of it encountering and joining the Emily vein. The evidence as to such departure and junction was mainly that furnished by the development done by plaintiffs at places selected by them for determining the issue presented. 1550 drift was run by defendant and the

raise 1736-A, which was the only connection from the lower workings where the vein and ore bodies in controversy are situated, was located and run by plaintiffs. They developed the proof, and the conditions in the ground as shown at these points were treated by both parties as decisive as to ownership of both of these veins. All of defendant's witnesses, Sales, Bateman, Barker, Steele and Wiley, testified to the departure and separation of the Intermediate and View veins in the 1550 drift, and to the junction of the View vein with the Emily.

The evidence also showed the departure of the View from the Intermediate in 1338 drift (Defendant's Exhibit 103) approximately 145 feet from the Poser east end line. The testimony of defendant's witnesses as to the junction of the View with the Emily is also corroborated by the contradictory positions of all of plaintiff's witnesses, and particularly by the admissions of plaintiffs' witnesses, Simkins, Burch and Roddewig.

The lower Court heard the testimony of all witnesses and observed their demeanors on the stand and under cross-examination. After the close of the testimony very voluminous briefs were presented, presenting each point of issue, and the case was fully argued orally. The lower Court then visited the premises, saw these workings in controversy and, as shown by the findings, particularly those with reference to the separation and departure of the Intermediate and View veins going easterly and the junction with the Emily.

The findings of the lower Court are clear and positive as to the separation and departure of the View and Intermediate veins in drift 1550 and the junction of the View with the Emily vein. In this court plaintiffs plainly conceded that these findings were final as to the facts covered. In their reply brief in this court (page 16) they said:

“Counsel devote many pages of appellee’s brief to a discussion of problems bearing on the question as to *whether there is a separation of the ‘View’ vein from the Intermediate vein and also whether the ‘View’ vein is a branch of the Emily* (pp. 298-314). We purposely refrained from discussing these propositions in our opening brief *because the trial court had decided these questions of fact adversely and to try and re-open them in the face of conflicting evidence would be useless.*” (Italics ours.)

This decision of the Trial Court was also treated as final by this court in its opinion (page 16) wherein it says:

“That admission is to be construed with the decision of the trial court that the View vein is a branch of the Emily and that the Emily had its apex in the defendant’s ground for the easterly 370 feet of the length of the Poser claim. *That fact so found and accepted* was, as we understand the reasoning of the District Court, the foundation for the judgment that the defendant was entitled to the ore bodies in dispute and embraced within the 370 foot extralateral easterly sweep.” (Italics ours.)

In contending now that this Court can, upon the evidence, decree rights in the View vein east of the 370 foot plane, is not alone in direct contradiction of plaintiff's written admission before this Court, but would require a departure from the settled rule and practice of this and other courts in equity cases. It is not a question of the weight of the evidence or as to whether this court would have reached the same conclusion as the lower Court, but merely one as to whether there is sufficient competent evidence to sustain the finding, and heretofore this has been admitted by plaintiffs and treated by this Court as accepted.

In *Butte & S. Copper Co. vs. Clark-Montana R. Co.*, 248 Fed. 609, this Court said:

“The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings *after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties.* We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. *Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal.*”

Plaintiffs do not now attempt to say that there was no competent evidence to sustain the findings of the lower Court, but seek to convince this Court

that upon evidence in the record, all of which was before, and considered by, the lower Court, the findings should be overturned and the facts found otherwise.

The position of plaintiffs in their brief in this court, that any inquiry into the findings of fact as to both the Poser and View veins would be futile and unjustified because of their having been made upon substantially conflicting evidence, undoubtedly made it unnecessary for this Court to examine the entire record, but now plaintiffs seek to convince the Court of their right to this View vein by references to selected and fragmentary portions of the evidence, which would lead to an entirely erroneous conclusion.

In considering plaintiffs' present contention as to ownership of all of the View vein ore bodies in controversy, it must be borne in mind that they are seeking to carry their rights entirely across the Poser claim, and to the east end line plane. They attempt to convince the Court that upon the "*uncontradicted evidence*" of all parties such a uniformity of strike and dip is shown for the Intermediate vein, on dip to the lowest levels, on strike to the east end line, and lack of separation of the two veins, Intermediate and View, one from the other, that it must be conceded that the Court's suggestion as to the western segment applies equally throughout the claim.

In this connection we also wish to call attention to the erroneous and misleading use of names of veins by plaintiffs in their petition for rehearing,

and also in their briefs and diagrams, filed in this court. Repeatedly they speak of the vein "called by the defendant" the Intermediate-View vein. The defendant has never used such designation. It has insisted from one end of the case to the other that the View vein, called clearly by that name, is a distinct and separate vein everywhere, so far as the matters in controversy are concerned, from the Intermediate vein, which it has always referred to under that name.

Their references to the uniform strike and dip of the Intermediate vein are also erroneous.

The Intermediate vein unquestionably, upon leaving the Rainbow, has a strike to the southeast which, in the easterly portion, swings to a slightly northeasterly course, pointing again back to the Rainbow. There was a direct controversy between the witnesses as to the strike of the vein in the easterly portion of 13020 drift, plaintiffs' witnesses giving it a course of east-west, and defendant's witnesses (Sales, p. 2172; Bateman, p. 2194, and Barker, p. 2208) gave it a course about north 60 to 62 east. The Judge below, who visited the premises, found (p. 2252) that this eastern segment had a northeasterly course. This course of the vein is clearly shown in Exhibit 170.

On the 1500 level the faulted segment of the Intermediate, east of the Emily, has not been developed, but a similar change in strike to a north-easterly direction is shown where it leaves drift 1588. (See Exhibit 172; Bateman, pp. 1342-3.) The strike of the stopes in controversy on the 2800

and 2600 levels is conceded by all parties to be in the neighborhood of south 45 degrees east, a difference of approximately 63 degrees from the strike of the Intermediate directly above in drift 13020.

As to the changes of dip, as the Intermediate in most places where exposed has a more or less south-easterly dip, the dip would necessarily change with the change in strike, as a change in strike of any vein, which has not an exactly vertical dip, must result in a dip change also. However, many marked changes in dip of the Intermediate vein can be found by reference to the record, some of which will be shown on our references hereafter to the exhibits as showing the departure of the Intermediate and View veins from each other on dip.

In plaintiffs' petition it is stated that the uncontradicted evidence shows the uniformity of dip of the Intermediate vein for a distance of 2000 feet on the dip. This impression is sought to be given, and undoubtedly it had weight with the Court in considering plaintiffs' claim that the two veins are merely one under different names, by including in the Intermediate vein the View vein in portions of the upper levels and, in the workings disclosing the View vein below the 1700 foot level, where every one of defendant's witnesses denied the presence of the Intermediate. The Court, looking at the illustrating model (not in evidence) used by Mr. Colby and the cross-sections, without having in mind that defendant's evidence and the Court's findings were to the effect that in the lower levels

but the View vein was found, would get this impression of uniform dip and identity of vein; but, when it is borne in mind that the only connection on dip from these lower levels, where defendant's witnesses and the Court found only the View vein, is in the raise 1736-A, which the Court found to be upon the View vein alone, then the real situation can be better appreciated.

Departures, that is, a moving apart of the two veins from the workings in the westerly higher levels where they were shown to lie, in juxtaposition or contact, or, in places, in intersection, are clearly shown in the evidence. A separation is shown in the east face of 1060 drift by Sales' testimony (Tr., p. 1094), where he described a cutting off of east-west mineralization by northwest fissuring. This condition is also disclosed on Defendant's Exhibit 100.

On the 1300 foot level, Defendant's Exhibit 103, plan map of the 1300 level, shows the point of separation of the View and Intermediate veins to be in 1338 drift at approximately 145 feet from the Poser east end line. In connection with the conditions at this point, plaintiffs, in their petition for rehearing, attempt to show that this departure of the View vein from the Intermediate in drift 1338 was disproved by the small crosscut 13023, run by plaintiffs during the trial. The fact is that certain witnesses were interrogated about some small streaks running out of the south side of the Intermediate vein in 1338 drift, but this was at a point easterly

from where the exhibit shows the View vein had departed. These small streaks, which plaintiffs discuss, may have ended before reaching this small crosscut, or may have turned back and joined the Intermediate vein; but, as they were not claimed or shown to have been any part of the View vein departing to the southeast, their appearance or nonappearance in this crosscut would be of no significance. The position of the crosscut is such that the View vein might well have departed at the point indicated and not show in working 13023. In connection with this contention plaintiffs state that the only reason given by defendant for not testifying as to the showing in this crosscut was that the work had been done so near the end of the trial that they had not had an opportunity to examine it. We cannot find that any such explanation was given as to this particular working, but we did call the Court's attention to the fact that with work being done in the ground continuously to practically the end of the trial, it would be impossible to cover all of such matters in the evidence, and that statements regarding the same should be cautiously received. The showing in this crosscut was not mentioned so far as we know by defendant's witnesses, nor was a reference to many other minor points of no particular significance, which might have been brought into the case if opportunity had been given.

On the 1500 foot level a decided separation and moving apart of the View and Intermediate veins is shown in 1550 drift just to the west of 1583

crosscut, a point approximately 145 feet westerly from the east end line of the Poser. (See Defendant's Exhibit 105 and testimony of Bateman, pp. 1342-3; Sales, p. 1094; Steele, p. 1630.)

The Court also clearly found this departure. (Tr., pp. 2248, 2252.) The plaintiffs suggest a doubt in the mind of the Court as to all of the vein passing out at this point, because of its finding (p. 2248) stating that the Intermediate vein

"reduced in size, in larger part if not all, departs northeasterly from 1550 drift."

The Court evidently made this finding as it proceeded to dispose of the evidence leading toward the junction point on the east end of the claim, as, in conclusion, page 2252, it clearly found that all of the Intermediate vein departed northeasterly from this drift. The language is as follows:

"And finally, to conclude that all the Intermediate vein departs northeasterly from 1550 drift at 1583 crosscut, better conforms to the Intermediate on the 1300 level."

The plaintiffs, in their petition, also contend that Mr. Wiley failed to separate all of the Intermediate vein from the View at this point, stating that he testified that at least one branch of the north-dipping Intermediate came back and joined the alleged View vein. We submit that this is not a fair construction of Mr. Wiley's evidence. An analysis of Mr. Wiley's testimony (Tr. IV, 1818) will disclose that he stated that because the branches in the working easterly through 1583 crosscut were not

developed he could not tell what relation all of the branches had to the Emily; that is, he could not say what development would disclose as to them.

On the 1700 foot level the plan map, Exhibit 107, plainly shows the departure on strike of the Intermediate and View veins going westerly at a point approximately 270 feet east of the Poser end line plane. This separation is also clearly shown on cross-section B-B, Exhibit 121, reproduced as Diagram 8, Appendix to plaintiffs' brief.

Departures on dip, that is, a clear separation of the Intermediate and View veins, are also shown in the evidence. Such a clear departure is shown on the cross-section B-B, Ex. 121, which is reproached as Diagram A, hereto attached, this separation being approximately on the 1700 foot level of the Elm Orlu and at a point approximately 280 feet west of the Poser east end line. This exhibit shows the veins clearly separating, the Intermediate continuing downward with a slightly north dip, and the View proceeding on its consistent southerly dip. Separation on dip is also indicated on section 1600 west, Defendant's Exhibit 120, at a point slightly above the 1500 foot level. The steepening of the Intermediate vein on the 1300 foot level, and a most probable separation, is indicated on section 309, Defendant's Exhibit 122, reproduced as Diagram 10 with plaintiffs' brief. The Court will here note a vein coming out of the Rainbow which corresponds to and is pointing directly toward the Intermediate coming down from above.

The statement is made in plaintiffs' petition that the testimony overwhelmingly establishes a clean sharp cut-off of all vein structure both Intermediate and View by the Emily in the easterly end of 1338 drift. As we have above shown, the testimony of defendant's witnesses, and its exhibits, all dispute the fact that there is any View structure in the east end of this drift; the cut-off of the Intermediate, of course, being admitted by all.

Plaintiffs' petition also treats the evidence as to the conditions in the drift on the 1500, 1300 and 1000 westerly as though there were no substantial evidence as to the existence of any portion of the View vein in these drifts.

That defendant's witnesses were clearly of the opinion that the View vein, though practically non-mineralized and consisting, in places, of nothing but gouge or gouge streaks, passes through these drifts until entering the Rainbow lode on the west, is clearly shown by a reference to the testimony. Sales (III, 1094) clearly testified to the entry into the drift 1060, where the Intermediate was admitted to be, of northwest structure or View vein, and the plain cutting off of the Intermediate mineralization, and the appearance westward in this drift of northwest structure. As to its existence in the drifts to the west, see Sales, pp. 1261-3; Steele, pp. 1627-9; Wiley, pp. 1824-6. Mr. Wiley is quoted by plaintiffs' counsel in their petition as stating that under the condition there he would expect them to be one vein. Mr. Wiley's answer to this was not

based on the existence of the gouge streak of the View vein, but on a hypothetical case which he was talking about where two streaks of quartz should come together which might constitute two veins but that "ordinarily you would expect them to be one."

On the whole, it is plain that the not unusual condition of the View vein, reduced to a streak or streaks of gouge, with little or no mineralization, a vein which Mr. Burch (Tr. I, 158) says in 1736-A raise pinches from two feet in the upper forty feet to two or three inches, following along in the same working with the Intermediate vein for greater or less distances, is reasonably shown upon this record.

In addition to the testimony of the witnesses above given, the Court, in defining the departure of both the Intermediate and View veins in drift 1550, clearly established the fact that they were both within that drift to the westerly. The strike of the gouge streak found in that vein to the west corresponds with that of the View below; it was not observed to depart from the openings, and it was clearly and unmistakably recognized to the east, all establishing the conclusion of defendant's witnesses of its presence in said drift.

In plaintiffs' petition it is stated that it was defendant's duty to develop this View vein westerly to an apex. The burden of proof was and is upon plaintiffs to establish their ownership to these extra-lateral veins or ore bodies lying under defendant's

ground. Plaintiffs conducted what they considered necessary development work in the drifts and raises. These workings, in the opinion of defendant's engineers, plainly demonstrated the junction of the Emily of northwest age, and the View vein. Defendant is not claiming any extralateral rights beneath plaintiffs' ground, and while, as the Court states, the evidentiary burden may shift under certain conditions, certainly the departure of the two veins on the 1500 and other levels, and the junction of the vein, which it is admitted by all parties came up the connecting raise, 1736-A, with the Emily, discharged any evidentiary burden as to proof which might have been shifted to defendant, and the Court's finding as to the right of the defendant, through its surface ownership, was certainly justified. The doing of unlimited development work was restricted both by expense and lack of time. The controversy by the actions of both parties practically centered on the developments in and about the top of 1736-A raise and the proven junction point, and little attention was paid by any party to the showing in the workings to the west. It stood unquestioned on the record, as the Court found, that veins of different ages in the Butte District cannot unite, and therefore it followed that there could be no union, legal or geological, of the two veins in the drifts to the west, once the junction and the distinct ages of the two veins, View and Intermediate, were established.

It may be noted that the evidence as to the departure of the Intermediate and View veins from

each other, and the junction of the View vein branch with the Emily near the top of 1736-A raise, is not the only proof in this record of the northwest age of the View vein, mined and stoped by the defendant below. The strike of the vein in these lower workings, its proximity to and probable junction with the Mill vein, a vein of admitted northwest age, and the fact that the Mill View vein faults and throws an admitted east-west vein, also furnish strong evidence of the northwest age of the vein. These points are briefly treated in our brief in this court (pp. 313-318).

Plaintiffs, in their petition, also again criticise the lower court for its holding in the Elm Orlu case, 233 Fed. 547, as to the establishment by one clear-cut crossing that there must follow cuttings or crossings everywhere, instead of possible union, and his holding that in the intensely mineralized Rainbow lode an appearance of union and merger might result through subsequent healing and cementation of results of a cutting or crossing.

It is suggested, in the face of this finding, that they are justified in commenting on the fact that the Trial Court found a junction of the View and Emily veins upon the development of a few feet only, and at one place only. The development at this point, which was done by plaintiffs, was sufficient, as defendant's witnesses testified and the Court found, to establish the union. Further development there could have availed nothing, as development to the east would have been upon the Emily vein, and the View had already been devel-

oped westerly from this point of junction. The departure of the two veins to the westerly, and this clear evidence of junction, was unquestionably sufficient.

The condition found in the westerly portion of these drifts in the upper levels, where the View and Intermediate veins follow the same working, even to the extent of being mingled or merged at places so identification is difficult or impossible, is not an unusual one. In his decision in the Elm Orlu case Judge Bourquin makes particular reference to the fact that the Black Rock Fault enters and follows along the Rainbow lode. In the testimony as to the Poser phases of this case all witnesses for both parties testify to the similar action on the part of the Black Rock Fault when it encounters the old east-west veins. The uncontradicted evidence in this case shows that the Copper vein, of admitted northwest age and joining the Emily, is merged or incorporated in the Rainbow lode for a considerable distance in a similar manner. (Steele, IV, 1628.) A reference to the plan maps in this case exhibits a great number of instances where northwest veins, colored blue, encounter and follow along the older east-west veins, marked by red. The Court will notice this condition on the plan maps, Exhibits 92, 93, 103, 109, 193, 113 and 114.

These exhibits show: Exhibit 92, the Emily strike faulting along the Rainbow for about 450 feet; Exhibit 93, the Emily strike faulting along the Rainbow for about 480 feet; Exhibit 103, the Copper vein strike faulting along the Rainbow for

150 feet; Exhibit 109, a northwest vein strike faulting along part of the State vein, in 2074 drift, for 120 feet, and a northwest vein strike faulting along an east-west vein in 2088 drift for 110 feet; Exhibit 113, a northwest vein strike faulting along the east-west State vein in 2412 drift for 140 feet; Exhibit 114, a northwest vein strike faulting along the State vein for 180 feet in 2612 drift.

A striking instance of this is shown in Diagram 14, attached to plaintiffs' brief, where the Emily vein is shown to encounter, first fault and then follow as a strike fault for a long distance the Rainbow lode.

Yet, no one would claim that there is anything but an intersection at most, although unquestionably in many places it would be impossible to distinguish the structure of one vein from the other, and certainly it would be an astonishing suggestion that in the case of veins of different ages, intersecting and lying in this position, one could be claimed to apex the other, or that one could be followed down to where it encounters the other and then the other followed and claimed.

Plaintiffs' counsel plainly recognize this condition in their brief in this court (pp. 107-8) where they state:

“The Poser fissure, as it came up from below where the stresses originated, encountered many East-West and Northwest veins or fissures already formed or in process of completion. Where these veins or fissures were parallel to

and coincident with the Poser plane of fracturing, the Poser followed them for a distance, re-opened them, and added to their mineralization. * * * This phenomenon, the tendency of a later fissure to follow an earlier one as a line of weakness, is well illustrated by the Black Rock fault, which follows the Rainbow for a long distance, and then broke over from the Rainbow just east of the Poser claim and followed the more recent plane of weakness presented by the Poser vein to the west."

And that this condition would not give rise to a claim of union, but merely at the most intersection, is shown in their reply brief in the lower court, a copy of which was left with this court at the time of the oral argument (p. 137), where they say:

"Plaintiffs do not claim a union of the Poser with any other vein, though admitting that in certain sections the Poser vein has reopened certain older fissures. * * * If there were any fragments of the older vein material remaining in this vein of more recent origin, it would necessarily not be possible, either in a physical or legal sense, to separate them. In some instances such enlarged mineralized bodies might be considered *as within an area of intersection*, and the ownership would consequently be awarded to the party having the senior title." (Italics ours.)

In their petition plaintiffs devote considerable space to a discussion showing that the Intermediate vein proceeds through 1338 drift to the east, is cut off by the Emily, and is found on the other side in 13020 drift, with probability that it extends to and through the Poser east end line, and further attempt to show that a presumption of union with the Rainbow lode above should be made.

We have made, and make, no question but that the Intermediate vein, after departing from the View vein in drift 1338, proceeds easterly and is cut off by the Emily, thrown a distance of about 140 feet, found again on the easterly side, and shown again in drift 13020, and at this most easterly development is extending toward the Poser east end line. Upon the dip there shown it is also true that if the dip continues and the Rainbow lode continues its dip, the two will meet at some point above this level. There is no development to show this, and the testimony of Lawson and Mead to the effect that they unite with the Rainbow in the easterly end is merely a conclusion or conjecture from the position of the veins as shown. However, we fail to see the materiality of the position of the Intermediate or junction with the Rainbow at this easterly end. It is settled by the Court's findings, and based upon the great preponderance of the evidence at least, that the View and Intermediate veins depart from the workings where they had been found together, the View vein departing to the southeast to a junction with the Emily, and the Intermediate continuing northeasterly. The strikes

of the two veins are divergent at that point, and they are found further apart as you proceed easterly. The Emily, which the View joins, has a distinct southeasterly course, and would continue still further from the easterly segment of the Intermediate. How the union of the Intermediate and Rainbow upon a higher level could give any rights upon this View vein easterly of the point of divergence from the View is hard to conjecture. It would be as reasonable to contend that because the Emily vein encounters the Rainbow further west and proceeds along it for several hundred feet as a strike fault, one could follow on the Rainbow lode, step over on the Emily, follow that down, and assert rights in the Emily by virtue of the Rainbow apex.

What plaintiffs are claiming is the right to proceed from the apex of the Rainbow down to the Intermediate, thence along the Intermediate to and through the Emily, which cuts and throws the Intermediate, thence down the View vein, a branch of the Emily to the ore bodies in controversy—rather a startling geological phenomenon.

That veins of different ages do not unite according to universally accepted geology in the Butte District was shown in the testimony of every witness who testified in this case. In regard to both the Poser and Intermediate controversies, the witnesses all established the identity of veins largely by their ages, shown by their action in coming in contact with each other. A typical example of this evidence is found in a statement of Mead for plain-

tiffs, where, in speaking of the Intermediate vein and the northwesterers, he stated: (V, p. 2020.)

“A. Yes; I should say the Mill vein and the Mill View vein are to be correlated on the southeasterly side of the Black Rock fault.

“Q. And you believe them to be one vein, a northwester?

“A. Yes.

“Q. And upon contact with the Intermediate vein, in your opinion, what will happen to the Intermediate vein?

“A. The Intermediate vein will be faulted by these northwesterers, *as all these eastwesterers are by these northwesterers.*” (Italics ours.)

Certainly there is ample evidence in the record to support the finding of geological fact by the Court (Tr., pp. 2247-8) that veins of different ages will not unite. We refer the Court to our discussion of this question in our petition for rehearing (pp. 8-17).

It seems plain to us from the opinion of this Court that the Court misunderstood and misconceived the record and position of the parties in its remarks regarding the identity of the Intermediate and View veins in the westerly workings. It certainly failed to understand that it is only in these workings, where they happen to coincide, where there is any lack of positive evidence as to the clear identity and distinct ages of the two veins. This Court, upon plaintiffs' statement and position, has accepted the findings of the lower Court

as to the junction of the View vein branch with the Emily vein, and the consequent establishing of the northwest age of the View vein, and the ownership of the stopes and ore bodies to the 370-foot plane. Further, whether, under these findings and the evidence in the case, plaintiffs were entitled to a modification giving them the extralateral sweep of the View vein west of the 370-foot plane, was a question entirely distinct from that as to the relation of the View and Intermediate veins within the 370 foot plane, which had been irrevocably settled by the Court's findings. Certainly this court did not appreciate that its statement as to the identity or union of the two veins, the View and Intermediate, in these upper workings, meant the reversal of the lower Court's findings, or an upsetting of the accepted Butte geology, that veins of different ages cannot unite.

We still contend that the westerly segment of the View vein was not in controversy in the action, and its apex not sufficiently proved, but, if the Court is of the opinion that sufficient is shown on the record to demonstrate this, the modification which the Court had in mind can still be reached with an elimination of the paragraph referring to the View and Intermediate veins in the westerly workings. Clearly, the results sought by plaintiffs would require a reversal by this Court of findings made upon an overwhelming mass of competent, clear evidence, supported by the Court's view of the premises, and against the written admission of plain-

tiffs' counsel upon this record, which was accepted by this Court.

THE SUB-FAULT APEX CLAIM.

In regard to any sub-fault apex on either the Emily or combined View-Emily veins, we refer the Court to the discussion in our brief (pp. 355-362).

We submit there can be no possible question upon this record but that the continuity and identity of the Emily vein through the fault was conceded by all witnesses and parties, and no question made upon it upon the record.

The contention of plaintiffs was based upon certain cross-sections of defendant, which correctly show what they purport to show, but do not, because of their not being taken at right angles to the Emily, and merely show lines of sections, give a correct picture of what occurred when the Emily vein encountered the fault. This is correctly portrayed upon the model used as an illustration upon the oral argument before this Court and left with the Court. From this the Court will readily observe that such cutting and dislocation of the Emily vein as was caused by the Black Rock fault could not possibly give rise to a claim of sub-fault apex. In fact, any locator of the Emily vein, following his vein downward, would have no difficulty in following and identifying it through the fault, and would unquestionably have a most substantial grievance if deprived of the lower portion of the vein through a claimed sub-fault apex.

However, this question is clearly put out of the case by the position of plaintiffs in claiming the In-

termediate vein through 1338 drift to where it is cut and thrown by the Emily a distance of approximately 140 feet, and then through the eastern segment, shown in drift 13020, with a claim that its rights carry to the east end line. We made no question of the identity and continuity of this Intermediate vein through this faulting at this point, but certainly plaintiffs' position disposes of any claim that a mere throw or cutting of a vein, although dislocated for a substantial distance, will preclude the right to follow through, where identity of the two segments is admitted.

THE PILOT VEIN.

In their petition counsel ask for a rehearing upon the question of claimed rights on the View vein and ore body by virtue of the apex of the Pilot vein.

This matter was fully gone into in our brief, to which we refer the Court, pages 318-324; but briefly, our answer is this:

This is also an entire change in position from that taken by plaintiffs upon the trial in the lower court. There, all of plaintiffs' witnesses testified, and their position was, that the Pilot vein, which was incorporated in the alleged Poser vein, was of Steward age, subsequent to the Emily, and could not unite with it. The position of defendant's witnesses was that the Pilot vein either ended at or joined the Emily. But one witness for defendant testified to observing a junction of these two veins at the west end of drift 1052 on the 1000 level. Plaintiffs' brief in the court below ridiculed the

idea that there was any substantial proof that the Pilot and Emily veins joined at any point, and introduced proof to show that at the point the witness Barker testified to seeing a junction on the 1000 level, the conditions of the workings made it a physical impossibility to see the two veins at that point. In their brief in the lower court no reference was made to any claim based on the Pilot vein, but, in the oral argument, a reference was made to it by plaintiffs' counsel, but they were, at the same time, strenuously contending to the contrary, that is, that the Pilot vein was of Steward age.

To establish rights upon the Pilot apex it must be shown that the Pilot vein joined the Emily vein above the point or points of junction of the View and Emily. The only point of junction testified to by the one witness for defendant was that upon the 1000 level at the west end of 1052 drift. This junction was upon strike. Easterly, the Pilot has a strike north of east, and the Emily a very decided southeasterly strike. The junction shown between the View vein branch and the Emily was on the 1500 foot level, ten feet from 1736-A raise. The Pilot vein has a northerly dip, as has the Emily. Where the Pilot vein is last disclosed in the 1052 drift at the Poser east end line, as shown by exhibit 119, the Pilot vein is approximately 425 feet north of the Emily and dipping to the north. In the section 1600, about 150 feet west of the east end line, Exhibit 120, the Pilot vein is shown approximately 175 feet north of the Emily vein, and likewise dipping to the north. Extending easterly the Pilot vein is shown to unite with the Copper

vein at about the 1800 foot level, and this united vein unites with the Emily at about the 2400 foot level. This is at a point within 250 feet east of the east end line plane of the Poser, and the point where the junction of the Emily and the View branch is shown, and more than 900 feet below. It seems a physical impossibility for the junction between the Pilot and the Emily to rise from more than 900 feet in going 250 feet westerly. There is not a scintilla of evidence in the record to show that the Pilot vein joins the Emily anywhere on dip above the line of junction of the View and Emily. Counsel, in this connection, refer to the cross-section B-B, Defendant's Exhibit 121, as showing the Pilot and Emily veins in practical union. This is the section that goes through the west end of 1052 drift, and shows the Pilot and Emily upon their strike very close together. This point is about 280 feet westerly from the Poser east end line. The cross-section shows nothing but the close proximity of the two veins at this point upon strike. Going downward the Pilot vein would undoubtedly encounter the Black Rock fault, and whether the View vein turns with the Emily above where the Pilot is shown upon this section, is undisclosed. This section aids nothing in disclosing a union between the Pilot and the Emily above the View-Emily junction.

Respectfully submitted,

L. O. EVANS,

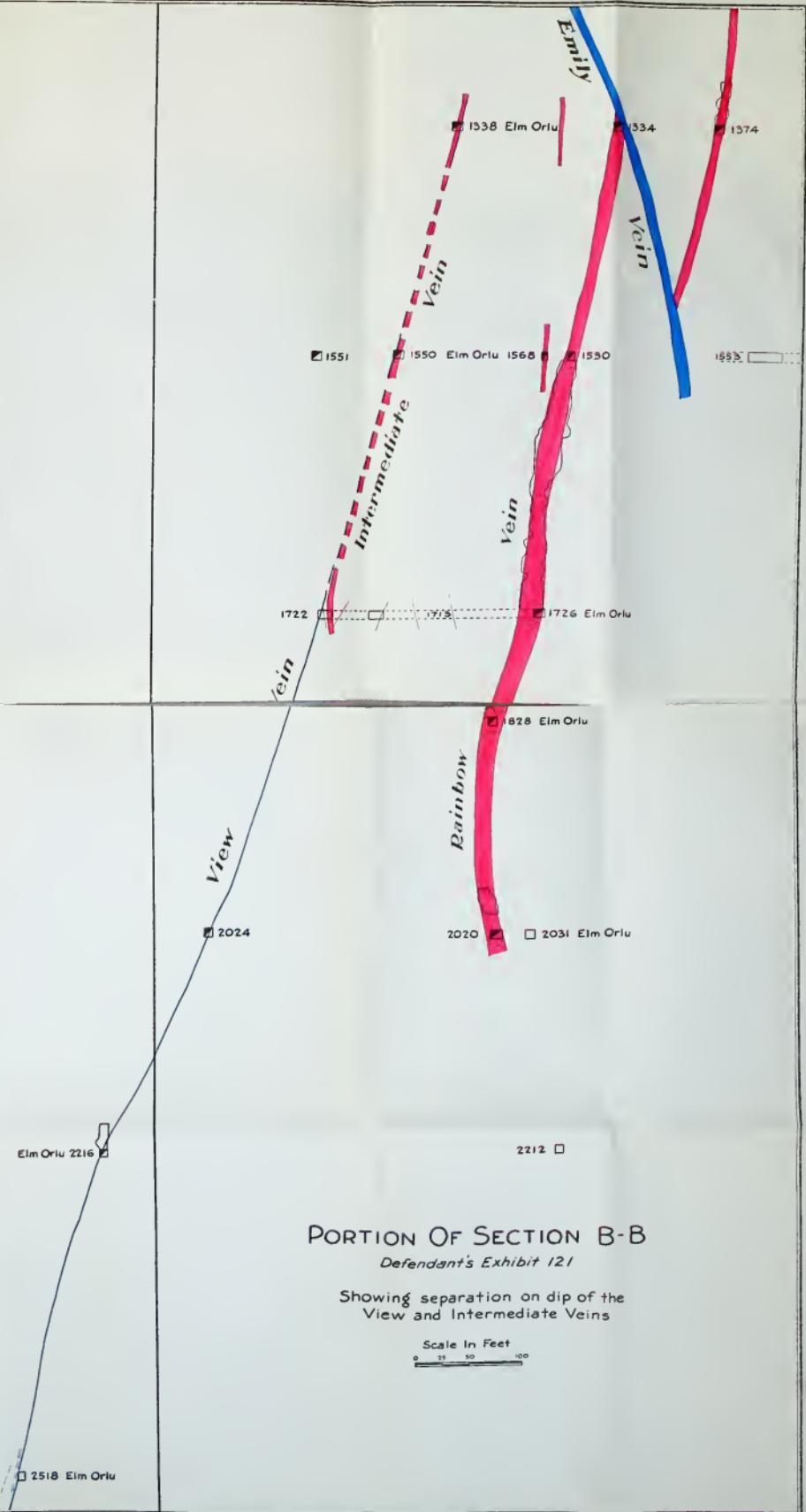
D. M. KELLY,

HENRY McALLISTER,

D. G. STIVERS,

Attorneys for Appellee.





PORTION OF SECTION B-B

Defendant's Exhibit 121

Showing separation on dip of the
View and Intermediate Veins

Scale In Feet
0 25 50 100

